NASRUL ANNUAR ABD SAMAD

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: 42-57-2001]
23 OCTOBER 2004

CRIMINAL LAW: *Penal Code - Section 376 - Appeal against conviction and sentence - Rape of minor - Element of penetration - Whether proved - Whether evidence of minor unreliable - Whether corroborated by medical evidence*

The accused was convicted and sentenced to seven years' imprisonment under s. 376 of the Penal Code for raping a minor. This was the appeal by the accused against his conviction and sentence. The issue was whether penetration was proved on the evidence given by the minor ('the complainant') and the medical evidence given by the doctor who examined her.

Held (allowing the appeal; quashing conviction and sentence):

[1] It was clear that the complainant did not see anything that happened to her from her stomach downwards. She agreed that it was only her presumption that there was penetration by the accused. A fact cannot be proved by a presumption. A finding must be based on proved facts or inferences drawn from proved facts. (p 197 g-h)

[2] The uncertainties in the answers given by the complainant were not subjected to a proper re-examination. The object of the re-examination is to give an opportunity to a witness to explain any part of his evidence given in cross-examination that is capable of being construed unfavourably. In view of the vague evidence of the complainant given in cross-examination that was not effectively explained in re-examination, it was unsafe to rely on her evidence. Further, her credibility must be judged against the fact that she made the police report for fear of being scolded and beaten up by her family. Also, her evidence that she was a virgin prior to the incident was unsupported by the medical evidence. There was therefore no clear evidence to show penetration. The finding of a fresh tear in the complainant by the doctor concerned was not of any corroborative value as the evidence it was meant to corroborate was deficient. Accordingly the prosecution failed to establish the element of penetration. (pp 198 b-g & 199 a-b)

Case(s) referred to:
Jones v. Dunkel [1958-1959] IOI CLR 298 ***(refd)***
Yap Ee Kong & Anor v. PP [1981] 1 MLJ 144 ***(refd)***

For the appellant - Amer Hamzah Arshad (Edmund Bon); M/s Zain & Co
For the prosecution - Ahmad Bache DPP

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul JCA:

In this case the accused was charged with an offence of rape in the Sessions Court at Kuala Lumpur. The charge reads as follows:

> Bahawa kamu pada 2/2/2001 jam lebih kurang 3.30 pagi di dalam Bangunan Projek Pembinaan Kondominium Pantai Dalam, Didalam Daerah Brickfields, Didalam Wilayah Persekutuan Kuala Lumpur telah merogol seorang perempuan nama Nor Diana binti Kasim @ Kasmi KP: 861101-56-5102 umur 14 tahun 3 bln dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 376 Kanun Keseksaan.

The accused claimed trial to the charge. The facts found by the learned Sessions Court Judge as stated in her grounds of judgment read as follows:

> Pengadu (SP3) dalam kes ini telah lari dari rumah pada 1.2.2001 jam lebih kurang 6.30 petang setelah menalipon OKT dan berjanji untuk berjumpa di stesyen minyak Esso. SP3 telah menungu hingga pukul 7.00 lebih dan menalipon OKT sekali lagi bertanya mengapa tidak datang. OKT telah mengatakan beliau tidak boleh datang. Kemudian SP3 telah minta bantuan seorang kawan yang dijumpa disitu untuk menalipon OKT dan menyuruhnya datang mengambil SP3 kerana SP3 takut untuk balik ke rumah.
>
> Akhirnya pada lebih kurang jam 8.00 malam OKT telah datang menjemput SP3 dengan menaiki motorsikal. Menurut SP3 beliau mengenali OKT sejak bulan September 2000. Sebelum 1.2.2001 SP3 telah pernah berjumpa OKT banyak kali. Pada petang tersebut OKT telah membawa SP3 ke rumah Mak Ciknya di Kampung Medan. Apabila sampai disana SP3 ditinggalkan disitu dimana OKT telah keluar dengan kawannya. Pada pukul 3 pagi hari berikutnya iaitu 2.2.2001 ketika SP3 sedang tidur, OKT telah mengejutkannya dan suruh ambil bag dan ajak pergi. Lepas keluar rumah OKT telah membawa SP3 pergi ke kawasan projek rumah yang belum siap dengan menaiki motorsikal OKT.

Apabila sampai ke kawasan projek OKT letakkan motor dalam kawasan tersebut dan telah menarik tangan SP3 masuk ke dalam bangunan. Seterusnya OKT telah merogol SP3 dimana telah dijelaskan dengan terperinci oleh SP3 didalam keterangan. OKT juga telah mengugut SP3 supaya tidak memberitahu orang lain mengenai perbuatannya merogol SP3. Jika beritahu OKT tidak akan menerima SP3 lagi apabila keluarga SP3 tidak menerimanya. Selepas itu pada pukul 5 pagi OKT menghantar SP3 ke Balai Polis Brickfields untuk buat repot lari dari rumah. Walau bagaimanapun repot SP3 tidak diterima dan telah disuruh oleh polis untuk balik ke rumah. SP3 telah balik ke rumah Mak Cik di Kapong Medan dengan menaiki bas pada pukul 8 pagi. Beliau tidak balik ke rumah kerana takut dimarahi oleh emaknya kerana tidak balik pada malam sebelumnya.

Semasa sampai dirumah Mak Cik, OKT ada disana dan bertanya samada telah buat repot atau belum. Seterusnya OKT menyuruh SP3 mandi dan dia keluar berjumpa kawan. SP3 berada dirumah Mak Cik OKT sehingga pukul 4.00 petang. Selepas itu seorang kawan OKT bernama Jamil (SD1) telah datang dan membawa SP3 ke Balai Polis Petaling Jaya dengan menaiki teksi untuk buat repot mengenai lari dari rumah. Sebelum itu emak SP3 ada menalipon talipon bimbit OKT yang ada pada SD1 dan SD1 telah menyuruh emak SP3 datang ke Balai Polis Petaling Jaya.

Apabila sampai di Balai Polis Petaling Jaya dan berjumpa emaknya SP3 tidak dibenarkan untuk dibawa balik ke rumah kerana pihak polis hendak membawanya membuat pemeriksaan doctor. Dalam soal balas SP3 mengatakan yang dia takut dengan emaknya dan telah memberitahu bahawa dia telah dirogol oleh OKT. Seterusnya pihak polis telah tangkap OKT dirumahnya di Kampung Medan dan dibawa ke Balai. SP3 yang menunjukkan rumah OKT kepada polis dan juga mengikut ketika OKT dibawa ke Balai. Satu lapuran polis telah dibuat iaitu Repot No 859/01 ditanda sebagai 'P3'.

Selepas itu SP3 dibawa ke IPK untuk ambil statement dan selepas itu dibawa ke Hospital Kuala Lumpur untuk pemeriksaan. Mengikut keterangan SP1 doktor yang memeriksa SP3, beliau memeriksa SP3 pada pukul 3.00 pagi pada masa itu SP3 dalam keadaan sedar, tekanan darah dan nadi adalah normal. Hasil pemeriksaan didapati tiada apa-apa kecederaan patah tulang, koyak kulit atau kecederaan lain. Tiada kesan 'external violence or defence injury'. Bahagian kemaluan dalam keadaan normal tetapi dalam faraj didapati ada kesan koyakan baru di selaput dara. Kesan tersebut berumur 24-48 jam. SP1 mendapati SP3 mempunyai selaput dara yang intact bermaksud terdapat kesan koyakan lama dibahagian lain selaput dara. Keterangan SP1 juga menunjukkan tiada kesan 'force penetration' dan disokong dengan tiadanya kecederaan dibahagian lain kemaluan. Mengenai koyakan baru selaput dara adalah koyakan pukul 4.00 dimana tempat koyakan berwarna ke merah-merahan. SP1 berpendapat koyakan tersebut adalah akibat dari kemasukan blunt object termasuk penis jari dan

benda, benda lain ke dalam faraj. SP1 ada bertanyakan latar belakang kejadian daripada pengadu dan mendapati kecederaan atas selaput dara adalah konsisten dengan apa yang diceritakan.

Menurut keterangan SP3 pada awalnya beliau tidak membenarkan OKT untuk mengadakan hubungan sek dengannya. Kemudian OKT mengatakan dia tak paksa, tetapi kalau tak nak dia akan panggil kawan-kawannya untuk buat SP3. Akibat dari ugutan tersebut SP3 telah membenarkan OKT melakukan hubungan sek dengan beliau. Hubungan sek berlaku selama 3 minit sahaja. SP3 pasti bahawa OKT telah memasukkan kemaluannya ke dalam kemaluan SP3 kerana beliau merasa sakit seperti tercucuk oleh benda tumpul.

Merujuk kepada pertuduhan kes ini Seksyen 375 Kanun Keseksaan menerangkan dengan jelas elemen-elemen yang perlu bagi rogol semenara Seksyen 376 adalah hukuman kesalahan rogol. Mahkamah berpuashati bahawa semasa kejadian SP3 berumur 14 tahun 3 bulan seperti yang dibuktikan melalui sijil kelahiran 'P2' yang dikemukakan, melalui SP3 dan disahkan SP4. Oleh kerana SP3 dibawah umur isu kerelaan tidak ditimbul dimana samada perbuatan dilakukan dengan kerelaan atau sebaliknya adalah tidak relevan.

The learned Sessions Court Judge correctly identified the elements that must be proved by the prosecution in offences of rape, that is to say, there must be proof of penetration and identity of the accused. She was satisfied that these two elements had been proved. As she said in her grounds of judgment:

Di dalam kes ini pendakwa telah berjaya membuktikan elemen yang pertama melalui keterangan SP3 sendiri dan disokong oleh keterangan SP1 yang telah melakukan pemeriksaan terhadap SP3. Pembelaan cuba mempertikaikan mengenai prosidur pemeriksaan oleh SP1 dimana dikatakan gagal untuk membuat pemeriksaan secara menyeluruh. Di sini Mahkamah berpuas hati dengan 'finding' dan penjelasan yang diberi oleh SP1. Oleh itu tiada keraguan bahawa penetration telah berlaku. Mengenai identiti OKT sebagai orang yang merogol adalah jelas dimana mereka adalah merupakan pasangan kekasih yang telah berkenalan selama lebih kurang 4 bulan. Sebelum kejadian mereka telah beberapa kali keluar bersama. Mengikut keterangan SP3 lagi semasa kejadian rogol muka SP3 adalah mengadap muka OKT. Oleh itu tiada sebab untuk meragui pengecaman OKT oleh SP3. Tambahan lagi semasa kejadian rogol itu sendiri SP3 ada beritahu OKT yang beliau merasa sakit dan OKT telah menyuruhnya buat tak tahu sahaja. Pada ketika itu SP3 pasti suara yang menjawab adalah suara OKT. Selain dari itu SP3 juga yang membawa polis ke rumah OKT dan mengecam OKT. Berdasarkan alasan di atas Mahkamah berpuashati satu kes *prima facie* telah berjaya dibuktikan dan OKT diarahkan untuk membela diri.

At the close of the case for the defence the accused was found guilty and sentenced to seven years imprisonment from the date of his arrest. The accused appealed against the conviction and sentence.

The main thrust of the argument of learned counsel before me was that the question of penetration had not been proved by the prosecution as whatever PW3 said in her examination-in-chief on this issue had been demolished in her cross-examination the relevant part of which reads as follows:

> Saya cadangkan awak tak nampak apa yang berlaku dibahagian bawah dari perut.
>
> A: Saya setuju.
>
> Q: Saya cadangkan yang awak cuma andaikan kemaluan OKT masuk setuju atau tidak.
>
> A: Setuju.

And as PW3 said later:

> Q: Saya cadangkan kamu buat lapuran P3 kerana takut dimarah dan dipukul oleh keluarga.
>
> A: Setuju.

The learned Deputy Public Prosecutor contended that whatever PW3 said in her cross-examination has been explained in her re-examination which is as follows:

> Pada malam itu saya boleh nampak ke muka OKT dari cahaya dari tingkap. Masa kejadian saya berada di X. Semalam kata masa OKT masuk kemaluan saya rasa sakit dan beritahu OKT dan OKT kata buat tak tahu saja. Saya pasti itu suara OKT. Saya kata buat andaian yang kemaluan OKT masuk kemaluan saya. Buat andaian tersebut kerana saya boleh rasa. Saya beritahu saya masih dara sebab saya tak pernah buat hubungan sek sebelum ini dengan sesiapa pun.

It is clear that PW3 did not see anything that happened to her from her stomach downwards. She agreed that it was only her presumption that the penis of the accused had penetrated into her private part. She said that she made this "… andaian tersebut kerana saya boleh rasa." She was not asked to explain what made her have that feeling. It could have been anything that had been made to penetrate into her private part. In any event a fact cannot be said to have been proved by a presumption. A finding must be based on proved facts or inferences drawn from proved facts. As Kitto J said in *Jones v. Dunkel* (1958-1959) IOI CLR 298 at p 305:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that case a specific event happened or a specific state of affairs existed.

There is no basis for the presumption made by PW3. The uncertainties in the answers given by her were not subjected to a proper re-examination. The object of this examination is to give an opportunity to a witness to explain any part of his evidence given in cross-examination which is capable of being construed unfavourably (see *Law of Evidence* by Woodroffe & Amir Ali 16th edn, vol 4 p 3623). In view of the vague evidence of PW3 as shown in her cross-examination which has not been effectively explained in her re-examination it is unsafe to rely on her evidence. Furthermore her credibility must be judged against the fact that she admitted in cross-examination that she made the police report as she was scared that she might be scolded and beaten up by her family. Her evidence that she was a virgin prior to the incident is not supported by the evidence of PW1 who said that there was also an old tear in PW3. There is therefore no clear evidence to show that the penis of the accused had penetrated into her private part. In the light of the nature of her evidence the finding of the fresh tear in her by PW1 is not of any corroborative value as the evidence it is meant to corroborate is deficient. In this regard I refer to *Yap Ee Kong & Anor v. PP* [1981] 1 MLJ 144 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) said at p. 146:

> In such a situation the principles enunciated by Lord Morris of *Barth-y-Gest in Director of Public Prosecutions v. Hester* [1973] AC 296, 315 should be applied:
>
> > The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said … . The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.
>
> Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary.

As the evidence of PW3 on the issue of penetration is uninspiring the corroborative evidence of PW1 serves no purpose. It follows that the evidence of PW1 cannot be used to support the evidence of PW1 as it is deficient.

It was therefore my view that the prosecution had failed to establish the element of penetration. In the upshot I allowed the appeal by the accused and quashed the conviction and sentence.